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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

BERNARD LOVE,

Plaintiff and Appellant,

v.

BAY AREA CABLEVISION, INC.

Defendant and Respondent.

H034321

(Santa Clara County
Super. Ct. No. CV103157)

I. INTRODUCTION

In 1992, appellant Bernard Love, a Denver, Colorado bus driver, obtained a federal license for a multichannel multipoint distribution service (MMDS)¹ in a Federal Communications Commission (FCC) lottery. With the assistance of his agent, Kingswood Associates, Inc. (Kingswood),² in 1993 Love entered into a five-year license lease agreement with Gulf American, Inc. (Gulf American),³ who in turn assigned its

¹ “Another method of subscription television is known as ‘multichannel multipoint distribution service’ (‘MMDS’), which employs microwave transmission to distribute programming to viewers.” (*Telsat v. Entertainment & Sports Prog. Network* (S.D.N.Y. 1990) 753 F.Supp. 109, 110; *American Scholastic TV Programming Foundation v. F.C.C.* (D.C. Cir. 1995) 46 F.3d 1173, 1179, 310 [MMDS is a form of wireless cable television].)

² Kingswood is not a party to this action.

³ Gulf American is not a party to this action.

interest in the lease agreement to respondent Bay Area Cablevision, Inc. (Bay Area Cablevision). In 1996, Kingswood ceased sending Love his share of the lease payments due under the lease agreement. On January 14, 2008, Love filed a complaint alleging that in 1996 defendant Bay Area Cablevision fraudulently obtained an assignment of his interest in the MMDS license without his knowledge. He sought a declaration that he was the true owner of the MMDS license and disgorgement of profits.

Bay Area Cablevision demurred to the complaint on the ground that it was time-barred under the three-year statute of limitations for fraud-based claims, Code of Civil Procedure section 338, subdivision (d) (hereafter, section 338(d)). The trial court sustained the demurrer with leave to amend and Love thereafter filed an amended complaint, to which Bay Area Cablevision again demurred on the ground that the complaint was time-barred. The trial court sustained the demurrer to the amended complaint without leave to amend and entered a judgment of dismissal as to Bay Area Cablevision.

On appeal, Love argues that his January 14, 2008 complaint was timely filed because the three-year statute of limitations was tolled under the fraudulent concealment doctrine until 2006, when an attorney informed him that his interest in the MDSS license had been assigned to Bay Area Cablevision. For the reasons stated below, we determine that the face of the amended complaint shows as a matter of law that Love's action against Bay Area Cablevision was untimely filed under section 338(d) more than three years after Love had notice of circumstances sufficient to put a reasonable person on inquiry. (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 902.)

II. FACTUAL BACKGROUND

Our summary of the facts is drawn from the amended complaint, since in reviewing an order sustaining a demurrer we must assume the truth of the properly pleaded factual allegations. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Although Love was a Denver bus driver who had no experience in the telecommunications industry, in 1992 he responded to a print advertisement placed by Kingswood that solicited applicants to enter an FCC lottery for broadband licenses. Love entered into an agreement with Kingswood, whereby Kingswood agreed to act as his agent in applying for an FCC license. After Love succeeded in obtaining an MMDS license issued by the FCC for a channel serving the Los Gatos, California area, Kingswood acted as his agent in marketing the license.

On January 22, 1993, with the assistance of Kingswood, Love entered into a channel lease agreement in which he leased the MMDS license to Gulf American for a renewable five-year lease term. About one year later, on February 18, 1994, Gulf American assigned its rights and interests under the channel lease agreement to Bay Area Cablevision. Love was unaware that the assignment to Bay Area Cablevision had occurred.

In May 1996, Bay Area Cablevision and Kingswood prepared an assignment agreement that purportedly assigned Love's interest in the MMDS license to Bay Area Cablevision in exchange for a payment of \$60,000, which was less than market value. Thereafter, Bay Area Cablevision issued a check for \$60,000 payable to Love that Kingswood endorsed and deposited into its own bank account. Neither Bay Area Cablevision nor Kingswood advised Love of the existence of the assignment agreement, on which his signature was forged, and he had no knowledge of the agreement. Love believes that Kingswood and Bay Area Cablevision conspired to conceal the purported assignment agreement from him in order to deprive him of his interest in the MMDS license.

Bay Area Cablevision subsequently submitted an application to the FCC for approval of the assignment of the MMDS license to Bay Area Cablevision, based on the allegedly fraudulent May 1996 assignment agreement. On July 31, 1998, the FCC

approved Bay Area Cablevision's application. Bay Area Cablevision remains the current holder of the MMDS license.

Sometime in 1996, Kingswood ceased sending Love his share of the lease payments due under the channel lease agreement. At that time, Love suspected that Kingswood was converting his share of the lease payments or otherwise failing to properly administer the channel lease agreement. From 1996 through 1998, Love attempted to contact Kingswood, but he was unsuccessful. In 1998, Love telephoned the FCC in order to institute a complaint against Kingswood, but he was advised by the FCC that its rules and regulations did not provide for such a proceeding. The FCC did not advise Love that the MMDS license had been transferred to Bay Area Cablevision.

Thereafter, during the period of 2000 to 2005, Love consulted with several attorneys for the purpose of instituting an action against Kingswood. No action was instituted, however, because Love was financially unable to either retain an attorney or perform an investigation in preparation for filing the action. In late 2005, Love consulted an attorney regarding the lease payments that he believed Kingswood owed him. The attorney's initial investigation revealed the purported assignment of Love's interest in the MMDS license to Bay Area Cablevision. In early 2006, the attorney advised Love of the purported assignment. Love then contacted his congressional representative regarding the matter. In July 2006 his congressional representative's office provided him with copies of documents relating to the MMDS license, including the allegedly fraudulent May 1996 assignment agreement, Bay Area Cablevision's transfer application to the FCC, and the FCC's approval of the MMDS license transfer. Before early 2006, Love had no knowledge of the purported transfer of the MMDS license to Bay Area Cablevision.

III. PROCEDURAL BACKGROUND

A. The Demurrer to the Original Complaint

Love filed his original complaint on January 14, 2008. Based on the allegations that Bay Area Cablevision had fraudulently obtained an assignment of his interest in the MMDS license, Love asserted two causes of action. The first cause of action sought a declaration that the May 1996 assignment agreement was invalid and Love was the true owner of the MMDS license. The second cause of action sought an accounting and disgorgement of the profits that defendants had obtained as a result of their exploitation of the MMDS license.

Bay Area Cablevision responded to the complaint on October 23, 2008, by filing a demurrer on the ground that the January 2008 complaint was time-barred under the three-year statute of limitations for fraud-based actions provided by section 338(d).⁴ In its points and authorities, Bay Area Cablevision argued that the three-year limitations period began to run in 1996, when Love was put on inquiry notice of his claims because the payments due to him under the channel lease agreement had stopped and Bay Area Cablevision had filed public documents with the FCC pertaining to the allegedly fraudulent license transfer. Alternatively, Bay Area Cablevision argued that the limitations period began to run no later than 1998, when Love started his inquiry into the status of the lease payments.

In opposition to the demurrer, Love contended that the three-year limitations period provided by section 338(d) was tolled under the fraudulent concealment doctrine until July 2006, when he received copies of the FCC documents concerning the transfer of the MMDS license to Bay Area Cablevision. Love explained that he had no

⁴ Section 338(d) provides a limitations period as follows: “Within three years [¶] . . . [¶] an action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

knowledge until July 2006 that the MMDS license had been assigned or transferred to Bay Area Cablevision because Kingswood and Bay Area Cablevision intentionally concealed the purported assignment and transfer.

In its order of December 4, 2008, the trial court sustained the demurrer with leave to amend. The court found that the complaint had failed to sufficiently allege the facts necessary to invoke the doctrine of fraudulent concealment and, therefore, the action was time-barred under section 338(d) because it was filed more than three years after July 31, 1998, the date when Bay Area Cablevision became the holder of the MMDS license.

B. The Demurrer to the Amended Complaint

Love filed an amended complaint on December 15, 2008. The amended complaint included additional factual allegations regarding the alleged fraudulent concealment, as follows: “The steps taken by [Kingswood] and [Bay Area Cablevision] to conceal [the] transaction from the Plaintiff included, but were not limited to the following: [¶] a. [Kingswood] and [Bay Area Cablevision] caused to be affixed to the Assignment Agreement, a forged and fraudulent signature purported to be that of plaintiff. [¶] b. The payment specified in the Assignment Agreement for transfer of the License was paid by [Bay Area Cablevision] by means of a check issued by [Bay Area Cablevision], made payable to plaintiff, dated May 23, 1996; that [was] delivered to [Kingswood]. Said check was endorsed by [Kingswood], but not by Plaintiff, and deposited into [Kingswood’s] bank account.”

Bay Area Cablevision demurred to the first amended complaint, reiterating its previous argument that the action was time-barred under section 338(d) because Love was on inquiry notice of his claims as early as 1996, when he stopped receiving lease payments, and as late as 1998, when he contacted the FCC regarding his complaint against Kingswood. Additionally, Bay Area Cablevision argued that the factual allegations of the amended complaint were insufficient to show that the statute of limitations was tolled under the fraudulent concealment doctrine, since Love had failed to

allege that Bay Area Cablevision had made any misrepresentations to him and had also failed to allege an excuse for his late discovery of the facts.

Love again argued in opposition to the demurrer that his original complaint was timely filed in January 2008 under section 338(d) because Kingswood and Bay Area Cablevision had actively conspired to conceal the May 1996 assignment agreement and its application for FCC approval of the transfer of the MMDS license, and therefore the limitations period did not begin to run until he received the FCC documents regarding the license transfer in July 2006.

The trial court sustained Bay Area Cablevision's demurrer without leave to amend in its order filed on March 24, 2009. The court rejected Love's contention that the statute of limitations was tolled under the fraudulent concealment doctrine, reasoning that because the amended complaint alleged that Love had consulted with several attorneys during the period of 2000 to 2005, but he was financially unable to retain an attorney to institute an action or perform an investigation during that time, "the first amended complaint plainly alleges that Plaintiff's financial difficulties--not Defendant--caused Plaintiff's failure to discover the assignment. Plaintiff filed his complaint on January 14, 2008, more than three years after 2000. Accordingly, the action is barred by the statute of limitations. (See [§ 338(d)].)"

A judgment of dismissal as to Bay Area Cablevision was entered on April 8, 2009. Love subsequently filed a timely notice of appeal.

IV. DISCUSSION

A. Standard of Review

In general, "[w]hen reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.]" (*Schifando v. City of Los*

Angeles, supra, 31 Cal.4th at p. 1081.) However, we do not assume the truth of “ ‘ “contentions, deductions or conclusions of fact or law.” ’ ” (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We then exercise our own independent judgment as to whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

In the present case, Bay Area Cablevision has demurred on the ground that the action is time-barred under the affirmative defense of the statute of limitations. We independently determine the merits of the demurrer under the following standard: “ ‘A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]’ [Citations.]” (*Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971-972.)

Additionally, where, as here, the trial court denied leave to amend the complaint following the sustaining of a demurrer, we review the court’s determination that no amendment could cure the defect in the complaint for abuse of discretion. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.)

B. *The Statute of Limitations*

The parties agree that the applicable statute of limitations is section 338(d), which provides a three-year limitations period for “[a]n action for relief on the ground of fraud or mistake.” That subdivision further provides: “ ‘The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.’ (§ 338(d).)” (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 347.) Thus, section 338(d) expressly incorporates the discovery rule.

“Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her [or his] injury was caused by wrongdoing, that someone has done something wrong to her [or him]. . . . [T]he limitations period begins once the plaintiff ‘ “ ‘has notice or information of circumstances to put a reasonable person *on inquiry*’ ” ’ [Citations]. A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she [or he] must decide whether to file suit or sit on her [or his] rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she [or he] cannot wait for the facts to find her [or him].” (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398.)

“A close cousin of the discovery rule is the ‘well accepted principle . . . of fraudulent concealment.’ [Citation.] ‘It has long been established that the defendant’s fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as the plaintiff, by the exercise of reasonable diligence, should have discovered it.’ [Citation.] Like the discovery rule, the rule of fraudulent concealment is an equitable principle designed to effect substantial justice between the parties; its rationale is ‘is that the culpable defendant should be estopped from profiting by his [or her] own wrong to the extent it hindered an “otherwise diligent” plaintiff in discovering his cause of action.’ [Citations.]” (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931; *Regents of the University of California v. Superior Court* (1999) 20 Cal.4th 509, 533.)

To establish tolling of the statute of limitations under the fraudulent concealment doctrine, “the plaintiff must show (1) the substantive elements of fraud, and (2) an excuse for late discovery of the facts. [Citation.]” (*Community Cause v. Boatwright, supra*, 124 Cal.App.3d at p. 900.) The issue of whether delayed discovery tolled the statute of

limitations is a ordinarily a question of fact. (*Snow v. A. H. Robins Co.* (1985) 165 Cal.App.3d 120, 128.) “However, whenever reasonable minds can draw only one conclusion from the evidence, the questions becomes one of law. [Citation.]” (*Ibid.*)

C. The Action is Time-Barred

Having reviewed the applicable standard of review and statute of limitations, we turn to Love’s first contention on appeal: that his original complaint was timely filed under the fraudulent concealment doctrine.

Love argues that the allegations set forth in the amended complaint show that Kingswood had a fiduciary duty to him, that Kingswood failed to send him notice of the assignment of his interest in the MMDS lease to Bay Area Cablevision, and Kingswood’s actions “amounted to the level of intentional concealment which allows an aggrieved party more time in which to discern the nature and extent of any injury suffered.” Love further argues that because he “was ignorant of the fraudulent transfer of the FCC Broadband license, but had been actively seeking and investigating for several years, it is only fair, just and right that the three year statute of limitations should have begun to run upon the discovery of the loss of the FCC Broadband license. For these reasons, it should not be said as a matter of law that [he] should have discovered the fraudulent theft of the FCC Broadband license before he did so in 2005 [*sic*] and therefore his action was filed within the statutory time.”

Bay Area Cablevision rejects Love’s contention that the three-year limitations period provided by section 338(d) was tolled until 2005 under the fraudulent concealment doctrine. According to Bay Area Cablevision, Love had knowledge of many circumstances sufficient to put a reasonable person on inquiry as early as 1996 and no later than 2000. These circumstances include, in Bay Area Cablevision’s view, the following: (1) in 1996, Kingswood stopped lease payments to Love; (2) also in 1996, Bay Area Cablevision filed public records with the FCC, including the assignment agreement and its application for FCC approval of the assignment of Love’s interest in

the MMDS lease to Bay Area Cablevision; (3) from 1996 through 1998, Love investigated the status of the lease payments by repeated but unsuccessful attempts to contact Kingswood; (4) in 1998, the channel lease agreement between Love and Gulf American expired and the FCC granted the MMDS lease to Bay Area Cablevision; (5) also in 1998, Love contacted the FCC in an attempt to institute a complaint against Kingswood; and (6) in 2000, Love consulted attorneys for the purpose of instituting an action against Kingswood.

Further, Bay Area Cablevision argues that the allegations in the amended complaint fail to excuse Love's late discovery of the facts because, as the trial court found, the allegations show that it was Love's financial difficulties, and not any actions by defendants, that caused his late discovery of the assignment of his lease interest to Bay Area Cablevision.

We agree with Bay Area Cablevision that Love's action is barred by the three-year statute of limitations provided by section 338(d). Even assuming that the amended complaint sufficiently alleges the substantive elements of fraud, the face of the complaint shows that by 2000 Love had notice of circumstances sufficient to put a reasonable person on inquiry as well as "the opportunity to obtain knowledge from sources open to his investigation." (*Community Cause v. Boatwright, supra*, 124 Cal.App.3d at p. 902.)

Specifically, our review shows that the amended complaint includes allegations indicating that as of 2000, Love had realized that he was no longer receiving his share of the lease payments under the channel lease agreement, had attempted to contact Kingswood about the missing payments, and had contacted both the FCC and an attorney regarding his potential claims against Kingswood. Additionally, the amended complaint alleges that in 1998 the FCC approved Bay Area Cablevision's application for an

assignment of the MMDS license to Bay Area Cablevision.⁵ These allegations establish that in 2000 Love had notice of circumstances sufficient to put a reasonable person on inquiry regarding the status of the MMDS license and the channel lease agreement and an opportunity to obtain knowledge from the FCC's public records. (*Community Cause v. Boatwright, supra*, 124 Cal.App.3d at p. 902 [statute commences to run when the plaintiff has the opportunity to obtain knowledge from sources such as public records].) Because Love did not file his original complaint until 2008, more than three years after 2000, the complaint was untimely filed and the action is time-barred as a matter of law.

We are not convinced by Love's argument that the statute of limitations was tolled until 2005 due to defendant's fraudulent concealment of the facts. The doctrine of fraudulent concealment did not toll the statute of limitations after 2000 because the statute is tolled "only for so long as the plaintiff remains justifiably ignorant of the facts upon which the cause of action depends; discovery or inquiry notice of the facts terminates the tolling. [Citations.]" (*Snyder v. Boy Scouts of America, Inc.* (1988) 205 Cal.App.3d 1318, 1323.) Similarly, even assuming that a fiduciary's breach of a duty to provide information to the plaintiff could constitute fraudulent concealment, once the plaintiff "became aware of facts which would make a reasonably prudent person suspicious, she [or he] had a duty to investigate further, and she [or he] was charged with knowledge of matters which would have been revealed by such an investigation. [Citation.]" (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874-875.) Here, as we have discussed, as of 2000 Love was aware of facts that would cause a reasonably prudent person to become suspicious and could have discovered the status of the MMDS license by an investigation of the FCC's public records.

⁵ In 1998, the Code of Federal Regulations provided that Bay Area Cablevision's application for the assignment of the MMDS license and the FCC's approval of the application were public records. (Former 47 C.F.R. §§ 2 21.27, 0.451, 0.453, 0.455.)

For these reasons, we conclude that the face of the complaint clearly and affirmatively shows that Love's action is time-barred under the applicable statute of limitations, section 338(d).

D. Denial of Leave to Amend

We further determine that the trial court did not abuse its discretion in sustaining the demurrer to the amended complaint without leave to amend. We understand Love to argue on appeal that the complaint could be amended to include a new cause of action for a continuing nuisance or trespass due to Bay Area Cablevision's alleged misappropriation and continuing use of the MMDS license. Love asserts that the limitations period for the new cause of action would begin to run on a daily basis since Bay Area Cablevision wrongfully uses the frequency assigned by the MMDS license every day.

Bay Area Cablevision observes that Love failed to argue below that the complaint could be amended to include a nuisance or trespass cause of action and accordingly argues that the issue is waived. Alternatively, Bay Area Cablevision contends that the complaint may not be amended to include a nuisance cause of action because no reported decision has ever extended a nuisance cause of action to any property other than real property.

Love did not forfeit the issue because it is well established that a plaintiff may show for the first time on appeal how the complaint may be amended to cure the defect that resulted in a demurrer being sustained without leave to amend. (Code Civ. Proc., § 472c, subd. (a);⁶ *Mercury Insurance Co. v. Pearson* (2008) 169 Cal.App.4th 1064, 1072; *Los Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861.) However, we find no merit in Love's contention that the complaint may be

⁶ Code of Civil Procedure section 472c, subdivision (a) provides, "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made."

amended to include a continuing nuisance or trespass cause of action for which the limitations period accrues daily. Love has not provided any authority to support his novel theory that misappropriation of an FCC license, or any other intangible form of property, may constitute a nuisance or trespass. Moreover, we believe that Love's proposed amendment would not state facts sufficient for a nuisance or trespass cause of action, in the absence of any allegation regarding physical property or land. The California Supreme Court has described a cause of action for private nuisance as "a nontrespassory interference with the private use and enjoyment of land. (See Civ. Code, §§ 3479-3481.)^[7]" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937.) Additionally, "many activities will give rise to liability both as a trespass and a nuisance, if they result in the violation of a person's right of exclusive possession of land, and also constitute an unreasonable and substantial interference with the use and enjoyment of the land. [Citations.]" (*Rancho Viejo v. Tres Amigos Viejos, LLC* (2002) 100 Cal.App.4th 550, fn. omitted.) " " "The classic example of a continuing nuisance is an ongoing . . . disturbance, . . . caused by noise, vibration or foul odor. [Citation.]" " " (*Gehr v. Baker Hughes Oil Field Operations* (2008) 165 Cal.App.4th 660, 667.)

Therefore, because Love has not convinced us that the complaint could be amended to show that the three-year statute of limitations provided by section 338(d) for fraud-based actions did not expire prior to the filing of the original complaint on January 14, 2008, we conclude that the trial court properly sustained the demurrer of Bay Area Cablevision without leave to amend and we will affirm the judgment of dismissal.

⁷ Civil Code section 3479 provides, "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

IV. DISPOSITION

The judgment of dismissal is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MCADAMS, J.

DUFFY, J.